OFFICE COPY

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, [redacted] 1961

No. [redacted] 63

MORGAN C. CHEWNING, PETITIONER

vs.

W. K. CUNNINGHAM, JR., SUPERINTENDENT OF THE VIRGINIA STATE PENITENTIARY

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE COMMONWEALTH OF VIRGINIA

PETITION FOR CERTIORARI FILED AUGUST 1, 1960
CERTIORARI GRANTED MARCH 6, 1961

Supreme Court of the United States

OCTOBER TERM, ~~1960~~ 1961

No. ~~783~~ 63

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[fol. 1] • • • •

[fol. 2] [File endorsement omitted]

VIRGINIA:

IN THE LAW AND EQUITY COURT OF RICHMOND

MORGAN C. CHEWNING, PETITIONER

vs.

W. FRANK SMYTH, JR., Superintendent of the Virginia State Penitentiary at Richmond, RESPONDENT

PETITION FOR WRIT OF HABEAS CORPUS AD SUBJICIENDUM—Filed September 24, 1959

To the Honorable Robert Lewis Young, Judge of Said Court:

COMES NOW, Morgan C. Chewning, by mail, on this 21 day of Sept., 1959, respectfully complaining and stating that he is unlawfully, unjustly and illegally imprisoned, detained, confined, restrained and deprived of his liberty in the Virginia State Penitentiary located at 500 Spring Street, Richmond, Virginia, by the respondent, W. Frank Smyth, Jr., Superintendent of said Peniteniary; that the said W. Frank Smyth, Jr., respondent, maintains his right to keep and hold the petitioner in confinement in said Virginia State Penitentiary under and by virtue of certain records and papers of commitment, to-wit:

An information filed by the respondent hereof, W. Frank Smyth, Jr., Superintendent of the Virginia State Penitentiary, at Richmond, Virginia, in the Circuit Court of the City of Richmond, Virginia during the month of June, 1958, that alleged the conviction of said Morgan C. Chewning for three (3) offenses (felonies) against the Commonwealth of Virginia, and said convictions resulted in confinement in the Virginia State Penitentiary on all three offenses; and said information alleged that said Morgan C. Chewning is the same person so named in the records on three previous convictions and penitentiary sentences as set out above, that on the 25th day of June, 1958, the said Morgan C. Chewning was called before the Court to

answer to the information filed by the respondent, and that the said Morgan C. Chewning was sentenced by the Circuit Court of the City of Richmond, Virginia, to imprisonment in the Virginia State Penitentiary for the space and period of ten (10) years, but with one (1) year of said ten-years suspended, to commence upon the expiration of the sentence he was then serving.

[fol. 3] Your petitioner further says that his imprisonment, detention and confinement in the Virginia State Penitentiary is illegal and that the illegality thereof consists in this, to-wit:

That the Circuit Court of the City of Richmond, Virginia proceeded to try and convict, and sentence the petitioner to imprisonment in the Virginia State Penitentiary for the space and period of ten years, with one-year of said sentence suspended, without first giving the petitioner the benefit and aid of the assistance of counsel to represent him, that such assistance of counsel was requested by the petitioner at the time of his trial on the 25th of June, 1958.

Your petitioner further says that in the Courts of the Commonwealth of Virginia, before an accused person can be tried and convicted, and sentenced to imprisonment in the Virginia State Penitentiary, if he is without the aid of a competent attorney at law to represent him, that under the provisions of Section 19-214.1 of the Code of Virginia (1952), and Article I, Section Eight of the Constitution of the Commonwealth of Virginia, the Court must first appoint to the accused, an attorney at law to represent him; that said Section 19-214.1 of the Code of Virginia, reads:

"Acts of Assembly, 1952, Chapter 348.

"Section 19-214.1. Appointment of defense counsel in felony cases.—In any case in which a person is charged with a felony and is not represented by counsel, the court, before accepting the plea of such person, *shall by order entered of record appoint an attorney at law to represent him.*" (Emphasis added).

That Section Eight of the Constitution of Virginia declares that "no person shall be deprived of life or

liberty, except by the law of the land", and that in *Watkins* v. *Commonwealth*, 174 Va. 518, the Supreme Court of Appeals of Virginia declared that the right to have the assistance of counsel is one of the rights guaranteed to an accused under this States Bill of Rights, by saying:

> "While there is no specific provision in the constitution of Virginia guaranteeing to persons accused of crime the right to have the assistance of counsel, in *Barnes* v. *Commonwealth*, 92 Va. 794, 803 SE, 23 S.E. 784, this court recognized the right to be a fundamental one. It is, we think, one of the rights guaranteed to an accused under our Bill of Rights. Virginia Constitution, Section 8."

[fol. 4] Your petitioner further says that the said Circuit Court of the City of Richmond, Virginia, on the 25th day of June, 1958, did not have the jurisdiction, power and authority, to proceed against the petitioner, to convict the petitioner, and to sentence the petitioner to imprisonment in the Virginia State Penitentiary for the space and period of ten years, with one-year suspended, without the assistance of counsel to represent him.

Your petitioner further says that said ten-year sentence, with one-year suspended, was void because the Circuit Court of the City of Richmond failed to comply with the laws of the Commonwealth of Virginia, to-wit: Section 19-214.1 of the Code of Virginia, and the Supreme Court's ruling in *Watkins* v. *Commonwealth*, 174 Va. 518, then in effect in the Commonwealth of Virginia; and which statute and ruling of law was, and is still in effect.

Your petitioner says that he is without adequate remedy save in this proceeding of habeas corpus.

WHEREFORE, AND BY REASON THEREOF, your petitioner prays that a writ of habeas corpus ad subjiciendum be granted and directed to the said W. Frank Smyth, Jr., Superintendent of the Virginia State Penitentiary, and made returnable to this Court, on or before the 7 day of Oct., 1959, commanding him to have the body of your petitioner before your Honorable Court, or before the Judge thereof in vacation, at a time and place to be specified, together with the records of said penitentiary

as to the period of time and cause of your petitioner's detentions; that the said order and judgment of said Circuit Court of the City of Richmond, Virginia, sentencing your petitioner to imprisonment in the penitentiary in the State of Virginia for the space and period of ten-years, with one year suspended, may be set aside and held for naught; that your petitioner be immediately and forthwith released from confinement in the Virginia State Penitentiary at Richmond, Virginia, and for such other and further relief as this Court may deem proper in the premises. And as in duty bound your petitioner will ever pray, etc.

Respectfully submitted,

/s/ Morgan C. Chewning, Petitioner
Virginia State Penitentiary at Richmond

Copy of the foregoing furnished
Respondent herein on

[fol. 5] Duly Sworn to by Morgan C. Chewning.
Jurat Omitted in Printing

[fols. 6-12] • • • •

[fol. 13] EXHIBIT "H" TO PETITION

IN THE CIRCUIT COURT OF THE CITY OF RICHMOND COMMONWEALTH OF VIRGINIA

INFORMATION—

BE IT REMEMBERED, that T. Gray Haddon, Attorney for the Commonwealth of Virginia, in and for the Circuit Court of the City of Richmond, who, for the said Commonwealth prosecutes in this behalf, cometh on the 25th day of June 1958, into the said Circuit Court of the City of Richmond and giveth the Court to understand and be informed that M. C. Chewning a convict in the penitentiary of Virginia, heretofore was convicted of three offenses against the laws of this Commonwealth, then and now punishable by confinement in the penitentiary, and was sentenced to confinement in the said penitentiary for the said offenses and was received into the said penitentiary in pursuance of said sentences, which said convictions will more fully and at large appear by reference to the records thereof, duly certified copies of which are here produced and shown to the Court. And the said Attorney for the Commonwealth giveth the Court further to understand and be informed, that the said convict is the identical person mentioned in each of the aforementioned records.

And the said Attorney for the Commonwealth giveth the Court here further to understand and be informed, that the said convict hath not been sentenced to the punishment by law prescribed for such third offense.

Whereupon the said Attorney for the Commonwealth prays the consideration of the Court herein the premises, and that due process of law be awarded against the said convict in this behalf, to make him answer to the said Commonwealth touching and concerning the premises aforesaid, and that such proceedings may be had there-

upon as are directed and required by the Acts of the General Assembly in this case made and provided.

/s/ T. Gray Haddon
Attorney for the Commonwealth

A Copy,

Teste: LUTHER LIBBY, JR., Clerk
by E. M. Edwards /s/t/ D.C.

REVERSE SIDE
82

COMMONWEALTH

vs.

M. C. Chewning

AN INFORMATION
JUN 25 1958

A Copy,

Teste: LUTHER LIBBY, JR., Clerk
by E. M. Edwards /s/t/ D.C.

[fol. 14] EXHIBIT "B" TO PETITION

IN THE CIRCUIT COURT OF THE CITY OF RICHMOND

Information (Third conviction)

COMMONWEALTH OF VIRGINIA, PLAINTIFF

against

M. C. CREWNING, ET AL, DEFENDANTS

SENTENCE—June 25, 1958

The Superintendent of the Penitentiary this day produced the above named defendants, and made report in writing that the foregoing named convicts had been three times convicted and sentenced to confinement in the Penitentiary for a felony; and

THEREUPON, the Attorney for the Commonwealth filed information setting forth the several records of conviction and alleging the identity of each with the person named in each, the information being read to each of the accused, and each being first cautioned as to his rights, and each acknowledged in open court that he is the person mentioned in the several records of conviction.

It is, therefore, CONSIDERED by the Court that each of the foregoing named convicts undergo a further confinement in the Penitentiary for a term of ten years, said term to begin at the end of the present term or terms of confinement of each in said Penitentiary.

But for reasons appearing to the Court, it is ordered that one year of the said sentence be suspended during the good behavior of the said defendants.

And the said prisoners are remanded to the custody of the Superintendent of said Penitentiary.

A Copy,

Teste: LUTHER LIBBY, JR., Clerk
by E. M. Edwards /s/t/ D.C.

[fol. 15] • • • •

[fol. 16] IN THE
LAW AND EQUITY COURT OF THE
CITY OF RICHMOND

[Title omitted]

ORDER APPOINTING COUNSEL—October 16, 1959

The petition herein praying that the Court assign an attorney at law to represent the petitioner in this proceeding, and the court, from an examination of the petition, being of the opinion that the petitioner is in need of the services of counsel but unable to engage counsel of his own choice on account of his poverty within the intent of Code Section 14-180, the Court, with his consent, doth appoint Robert N. Pollard, Jr., Esquire, of the Richmond Bar, to represent the petitioner herein.

Enter

[init.] R. L. Y.
Oct. 16, 1959

[fol. 17] • • • •

[fol. 18] IN
LAW AND EQUITY COURT OF THE
CITY OF RICHMOND

Richmond, Virginia

OPINION—February 5, 1960

Robert N. Pollard, Jr., Esq.,
Williams, Mullen, Pollard & Rogers, Attys,
1001 East Main Street,
Richmond 19, Virginia.

Re: Morgan C. Chewning v. Frank W. Smyth, Jr.,
Law No. A-3082.

My dear Mr. Pollard:

First of all I wish to thank you for the careful attention which you have given this matter. After reading the authorities cited, as well as others, my conclusion is that the failure to furnish counsel to Mr. Chewning at his request does not invalidate the sentence given him under Virginia Code Section 53-296. In keeping with this conclusion, I have this day entered an order denying the writ and dismissing the petition.

As to the mandate of the Fourteenth Amendment to the Constitution of the United States, here relied upon, the converse has been adjudicated. In Gryger v. Burke, 334 U.S. 728, where release or habeas corpus was sought on the ground that petitioner was without counsel at his recidivist hearing, Mr. Justice Jackson said, in part, as follows (at p. 731):

> ". . . the State's failure to provide counsel for this petitioner on his plea to the fourth offender charge did not render his conviction and sentence invalid."

This holding was adhered to in Chandler v. Fretag, 348 U.S. 3, where it was decided that, while a State is not required under the Fourteenth Amendment to furnish counsel, it cannot deny the defendant in a repeater hearing of the right to be heard by counsel of his own choice.

The difficulty in this case, more apparent than real, comes from the fact that under our habitual criminal statute the proceeding for sentencing the convict to the penitentiary for an additional term is separate from his trial on the last offense committed. Were our statute of the other type, that is, of the type where the proceedure for imposing the additional penalty for being an habitual criminal is a part of the prosecution for the last committed offense, under our law the accused would have counsel. [fol. 19] Since with us the two proceedings are separate, the petitioner here argues that when charged as a habitual criminal he is charged with a separate offence, and, therefore entitled to counsel.

It is true that the proceeding set out in Code Section 53-296 is a criminal, rather than civil, one. *Wright's Case,* 109 Va 847. It is also true that the defendant in such a proceeding has the same rights to a speedy trial, to time for preparation, to insistance of counsel of his own choice, to compulsory process for witnesses, to be confronted with the witnesses against him, to require proof beyond a reasonable doubt, and to most other rights enjoyed by a defendant on trial for a criminal offense. 25 Am. Jur. 278, Hab. Crim., Sec. 31. The fallacy of the petitioner's argument in this regard, however, is that the information filed against him did not charge the commission of a new separate offense. The proceeding thus instituted was only connected with the measure of punishment for the last-committed crime. 25 Am. Jur. 260; 24 C.J.S. 1143.

In King v. *Lynn, Penitentiary Superintendent,* 90 Va. 345, a petition for habeas corpus was filed in the Supreme Court of Appeals of Virginia attacking the validity of a sentence imposed upon him as a second offender under Sections 4179 through 4183 of the Code of 1887, substantially like our present Section 53-296. The Court, in denying the writ said that the grounds of attack were "bottomed upon the assumption that the prisioner stands in the position of a person charged with a crime in the first instance" but that "manifestly this case has no analogy to that."

In Michie's Jur. Vol. 5, p. 443, the text is in part as follows:

> "But such a statute does not make it an offense or crime for one to have been convicted more than once. Former conviction is not an integral part of the second or new offense. The law simply enjoins a longer sentence because of a former conviction. It does not prosecute and punish for the former conviction. It cannot do that. It adds punishment for the crime as to which one is lastly convicted because of the class to which he belongs. The sentence is an incident to the last offense alone. But for that offense it would not be imposed. So proceedings made under such statute cannot be said to constitute a holding to answer for crime or a placing in second jeopardy for an offense. They are merely ancillary proceedings for [fol. 20] the rightful sentence which the law mandatorily enjoins upon those already held or jeopardized."

Mr. Justice Hughes, in *Graham* v. *West Virginia,* 224 U.S. 616, dealing with a proceeding under a West Virginia Statute taken from an earlier form of our present Code Section 53-296, said as follows (at p. 624):

> *"By this proceeding he was not held to answer for an offense; the information did not allege crime.* As was said by the Supreme Court of Appeals of West Virginia: "It (the information) alleges that he has been held to answer for crime, and that he stands convicted of it through the indictment of a grand jury. It points him out as a convict already held, upon whom rests the general sentence of the law of life imprisonment . . . The proceedings under the statute are for identification only. They are clearly not for the establishment of guilt. The question of guilt is not reopened.'" (underscoring supplied)

Our Code Section 19-214-1, relating to the appointment of defense counsel applies to "any case in which a person is charged with a felony." Section 8 of the Virginia Constitution, as interpreted in *Watkins* v. *Com.,* 174 Va. 518, 522, is applicable to the case of "persons accused of crime."

It thus appears that there is no requirement under the State or Federal Constitution, nor is there any Virginia statute, requiring that the Circuit Court of the City of Richmond assign counsel to persons brought before it under Code Section 53-296.

Yours very truly,

/s/ Robert Lewis Young

RLY/b

[fol. 21] IN THE
LAW AND EQUITY COURT OF THE
CITY OF RICHMOND

[Title omitted]

ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS—
February 5, 1960

The court having fully considered the petition herein, and exhibits therewith, and the argument of counsel for the petitioner, appointed with his consent by the court, and having maturely considered of its decision to be rendered thereon, finds no probable cause to believe that petitioner is detained without lawful authority. Therefore, it is ordered that the writ of habeas corpus herein prayed for be denied, to which action of the court the petitioner, by counsel, excepted.

And the services of Robert N. Pollard, Jr., Esquire, contemplated by the order herein of the 16th day of October, 1959, having been fully and ably performed, the Court doth discharge him from any further responsibility in this matter, with sincere appreciation.

Enter

[init.] R. L. Y.
Feb. 5, 1960

A Copy,

Teste: LUTHER LIBBY, JR., Clerk
by /s/ Edward G. Kidd D.C.
OB 37 p 3

[fols. 22-36] • • • •

[fol. 37] IN THE
LAW AND EQUITY COURT OF THE
CITY OF RICHMOND

ORDER RE MOTION FOR RECONSIDERATION—March 1, 1960

Mr. Morgan C. Chewning
500 Spring Street
Richmond, Virginia

Re: *Chewning* v. *Smyth etc.*

My dear Mr. Chewning:

I have your document entitled "Motion for Reconsideration" and have lodged the same with the papers in the above entitled proceding. So far as I am informed there is no provision in the law for such a motion. Out of interest, however, I have read it and find nothing not already urged in your behalf and considered.

While I realize that you are entirely sincere in your views, you must realize that this court has fully performed its function. Feeling aggrieved by the decision herein of February 5, 1960, as you apparently do, you should petition the Supreme Court of Appeals of Virginia for a writ of error, remembering that the mailing to me of the "Motion for Reconsideration" does not affect the time within which notice of appeal must be filed and other procedural steps taken. Should you request it, you may rest assured that the Clerk of this Court will be happy to prepare and transmit a transcript of the record in this proceeding to the appellate court without cost to you.

Very truly yours,

/s/ Robert Lewis Young

RLY/e

[fol. 38] [File endorsement omitted]

IN THE
LAW AND EQUITY COURT OF THE
CITY OF RICHMOND

[Title omitted]

NOTICE OF APPEAL—Filed March 10, 1960

To the Honorable Robert Lewis Young, Judge of Said Court:

COMES Now, your Appellant, Morgan C. Chewning, by mail, on this 7th day of March, 1960 said appellant heretofore being the petitioner in an application for the writ of habeas corpus ad subjiciendum, addressed to this Honorable Court, to declare null and void a nine (9) year penitentiary sentence unlawfully imposed upon the appellant by the Circuit Court of the City of Richmond, Virginia on the 25th of June, 1958; And, upon which application to this Court, the Court, by an Order entered on February 5th, 1960, denied the writ of habeas corpus heretofore prayed for without a hearing and without requiring the respondent—appellee hereof to show cause; And, due to said denial of the appellant's prayer, the appellant does now move and does hereby give notice of his desire to appeal from the order and final judgment, erroneously rendered in this case to the Supreme Court of the Commonwealth of Virginia.

Appellant prays that this Court allow this appeal to be made in forma pauperis, as it is made in good faith upon the part of the appellant; And, that this Court, by an Order entered of record, cause the entire record and proceedings in this cause, together with the Court's permission to appeal, and the assigned errors herewith attached and made a part of the record, to be sent and transmitted to the Clerk of the Supreme Court of Appeals of Virginia.

Respectfully submitted,

/s/ Morgan C. Chewning
MORGAN C. CHEWNING, Petitioner-Appellant
Virginia State Penitentiary
Richmond, Virginia

[fol. 39] [File endorsement omitted]

IN THE
LAW AND EQUITY COURT OF THE
CITY OF RICHMOND

[Title omitted]

ASSIGNMENT OF ERRORS—Filed March 10, 1960

To the Honorable Robert Lewis Young, Judge of Said Court:

COMES Now, your appellant, above named, heretofore the petitioner in an application for the writ of habeas corpus ad subjiciendum, said petition and prayer being denied on the 5th day of February, 1960 setting forth to this Honorable Court, his Assignment of Errors as required by Rule 5 : 1, Section 4, of the Rules of the Supreme Court of Appeals of Virginia:

These particular Assignment of Errors are:

1. The Court erred in rejecting and denying the petition for a writ of habeas corpus ad subjiciendum without a hearing where evidence and argument could be heard.
2. The Court erred in holding that failure to furnish counsel to the petitioner at his request does not invalidate the sentence given him under Virginia Code Section 53-296.
3. The Court erred in holding that it finds no probable cause to believe that petitioner is detained without lawful authority.
4. The Court erred in holding that the rule of Watkins v. Com., 174 Va. 518, 522, is applicable to the case of "persons accused of crime" only.
5. The Court erred in sustaining the judgment of conviction and sentencing and refusing the release and discharge of the petitioner.

WHEREFORE, your appellant prays this Honorable Court to cause the records in this case, together with this Court's permission to appeal the aforesaid, to be sent to the

Supreme Court of Appeals of Virginia as heretofore requested.

And this your appellant does forever pray.

Respectfully submitted,

/s/ Morgan C. Chewning
MORGAN C. CHEWNING, Petitioner-Appellant
Virginia State Penitentiary at Richmond

Copy furnished Appellee
3/7/60

[fol. 40] [File endorsement omitted]

IN THE
LAW AND EQUITY COURT OF THE
CITY OF RICHMOND

[Title omitted]

REQUEST FOR RECORD—Filed March 10, 1960

COMES Now, the Appellant, Morgan C. Chewning, by mail, and in conjunction with his "Notice of Appeal" and "Assignment of Errors", does hereby request that the following records and papers be forwarded to the Clerk of the Supreme Court of Appeals of Virginia:

1. Petition for a Writ of Habeas Corpus Ad Subjiciendum, with accompanying Memorandum in Support, to include the Exhibits filed therewith on September 21, 1959.
2. Letter from this Court to Robert N. Pollard, Jr., date February 5th, 1960, said letter bearing the form of an opinion.
3. Final Order of Judgment entered February 5, 1960 wherein the habeas corpus hereinbefore prayed by the petitioner was denied by this Court.

Appellant states that the forwarding of the above is both needful and necessary in order than an appeal may be perfected from the judgment of this Honorable Court.

Respectfully submitted,

/s/ Morgan C. Chewning
MORGAN C. CHEWNING, Petitioner-Appellant
Virginia State Penitentiary at Richmond

[fol. 41] IN THE
SUPREME COURT OF APPEALS OF VIRGINIA
AT RICHMOND

Record No. .....

MORGAN C. CHEWNING, PLAINTIFF IN ERROR

versus

W. FRANK SMYTH, JR., DEFENDANT IN ERROR

PETITION FOR WRIT OF ERROR—Filed March 22, 1960

To the Honorable Chief Justice and Justices of the Supreme Court of Appeals of Virginia:

This is an appeal by Morgan C. Chewning, petitioner below, from a judgment rendered against him, entered in the Law and Equity Court of the City of Richmond, on the 5th day of February, 1960.

For convenience, the Plaintiff in Error will be referred to as the petitioner, and the Defendant in Error shall be referred to as the respondent.

The record in this case, including a written opinion by the Court below, duly certified, will be transmitted by the Clerk of the Court below to this Honorable Court as requested by the petitioner on the 7th of March, 1960.

PROCEEDINGS IN THE LOWER COURT

This appeal grows out of an application for the writ of habeas corpus ad subjiciendum, submitted on the 21st of September, 1959, wherein the petitioner complained that he was being illegally and unjustly held in confine-[fol. 42] ment by the respondent due to the violation of his Constitutional Right to the assistance of counsel when proceeded against as a third offendor under Section 53-296 of the Code of Virginia in the Circuit Court of the City of Richmond on the 25th of June, 1958. The petitioner complained that the sentence imposed upon him by the said Circuit Court for the space and period of nine (9) years was null and void and ought to be set aside because he was refused the right to have the assistance of

counsel for his defense upon his request. On February 5th, 1960, the Court below denied and dismissed the prayer of the petitioner with a written opinion in the form of a letter, to which action of the Court the petitioner excepted.

Assignments of Error

The petitioner respectfully assigns the following errors:

1. That the Court erred in rejecting and denying the petition for a writ of habeas corpus ad subjiciendum without a hearing where evidence and argument could be heard.
2. That the Court erred in holding that failure to furnish counsel to the petitioner at his request does not invalidate the sentence given him under Virginia Code Section 53-296.
3. That the Court erred in holding that it finds no probable cause to believe that petitioner is detained without lawful authority.
4. That the Court erred in holding that the rule of *Watkins* v. *Com.*, 174 Va. 518, 522, is applicable to the cases of "persons accused of crime" only.
5. That the Court erred in sustaining the judgment of conviction and sentencing and refusing the release and discharge of the petitioner.

Statement of Facts

On the 25th of June, 1958, T. Gray Haddon, Attorney for the Commonwealth, in and for the Circuit Court of the City of Richmond, filed an Information against the petitioner, an inmate of the Virginia Penitentiary, alleging that the petitioner had heretofore been convicted of three (3) offenses against the laws of this Commonwealth, then and now punishable by confinement in the penitentiary in pursuance of said sentences and was received into the [fol. 43] said penitentiary in pursuance of said sentences, and that the petitioner was the identical person mentioned in the information.

That the petitioner was put before the Court on the 25th of June, 1958 upon the information filed by the said Attorney for the Commonwealth, and a previous information

submitted by the respondent hereof, and after having the information read to him, the petitioner requested the Court to assign and give the petitioner the assistance of counsel for his defense and protection; That upon such request being made, the Court denied the assistance of counsel, and proceeded to sentence the petitioner to further confinement in the said penitentiary for the space and period of ten (10) years; But, for reasons appearing to the Court, one (1) year of said sentence was suspended upon the condition of good behavior.

ARGUMENT

FIRST ISSUE: Did the Court err in denying the petition for the writ of habeas corpus ad subjiciendum without a hearing; and did the Court err in ruling that no probable cause had been shown by the petitioner; and did the Court err in sustaining the Order of Commitment of the Circuit Court of the City of Richmond (Assignments of Error numbers 1, 3 and 5)?

Since no hearing was held on the petitioner's prayer for relief, Assignments of Error 1, 3 and 5 are nearest to the heart of the matter, and to avoid repetition will be included in the argument of the first issue.

This case is governed by the rights of an accused, or defendant, under Section Eight of the Virginia Constitution, and the 14th Article of Amendment of the Constitution of the United States.

Petitioner contended in his prayer for relief from illegal confinement, that the sentence imposed upon him on June 25th, 1958 was null and void because he was denied the assistance of counsel. That the assignment of counsel to a defendant in a criminal case, is of a Constitutional nature, cannot be denied. Further, the right to the assistance of counsel is provided for by Section 19-214.1 of the Code of Virginia, where we find:

"Section 19-214.1. Appointment of defense counsel [fol. 44] in felony cases.—In any cases in which a person is charged with a felony and is not represented by counsel, *the court, before accepting the plea of such person, shall by order entered of record appoint an*

attorney at law to represent him." (Underscoring supplied)

This is the Section of law in Virginia which guarantees every person facing a penitentiary confinement, the right to the aid of counsel. It is not just a mere Statutory provision, but an extension of the interpretation of the contents of Section Eight of the State's Constitution, and of the 14th Amendment to the National Constitution. When this right has been violated, then the defendant has not been afforded a trial within the aegis of the Constitutions involved.

Perhaps the most firmly settled decision concerning the granting of a hearing upon the submission of a petition for a writ of habeas corpus, is that of *Comm. of Pa. ex rel Stephen J. Herman* v. *John W. Claudy,* No. 45, October Term, 1955, Sup. Ct. of the United States, where, on January 6, 1956, the learned Justices of the highest Court of this Country stated as follows:

". . . It is true that the trial record shows that petitioner told the judge that he was guilty and said 'I throw myself at the mercy of the court, your honor', but neither these nor any other statements made before the trial judge at that time are in themselves sufficient to refute as frivolous of false the serious charges made by the petitioner concerning matters not shown by record. See *Palmer* v. *Ashe,* 342, U.S. 134, 137. It is entirely possible that petitioner's prior confession caused him, in the absence of counsel, to enter the guilty plea. Moreover, the number and complexity of the charges against petitioner, as well as their seriousness, create a strong conviction that no layman could have understood the accusations and that petitioner should, therefore have been advised of his right to be represented by counsel. We cannot agree with the Pennsylvania Superior Court that the mere fact that petitioner had, without the benefit of counsel, pleaded guilty to an offense 2 years before showed that he had the capacity to defend himself against the 30 charges here. We Held in *Gibbs* v. *Burke,* 337 U.S. 773, that in spite of Gibb's conviction

in 6 prior criminal cases the circumstances showed he was entitled to the benefit of counsel. In *Uvegas* v. *Pennsylvania,* 335 U.S. 437, where the facts were strikingly similar to those presented here, we held that representation by counsel was required by Due Process of law Clause. * * * The sound premise upon which these holdings rested is that men incarcerated in flagrant violation of their constitutional rights have a remedy."

The Court then said:

[fol. 45] "The chief argument made by the State here in support of the Court's summary dismissal of the petition is this:

"Counsel for petitioner argues that since facts are alleged in the petitioner, a hearing must be held. Since our answer contradicted the allegations in the petition, the lower court was not required to grant a hearing. This contention was sustained by the Superior Court.' *We cannot accept this argument. Under the allegations here petitioner is entitled to relief if he can prove his charges.* He cannot be denied a hearing merely because the allegations of his petition were contradicted by the prosecuting officers." (underscoring supplied).

As this case shows, the question of counsel is a constitutional one under the Due Process Clause of the 14th Amendment, and when raised, a hearing to determine the stability of the facts alleged, must be granted.

Thus, probable cause was shown as required by Section 8-596 of the Code of Virginia, and upon the submission of a substantially firm constitutional issue, it was the duty of the Court to grant the writ and hold a hearing where evidence and argument could be heard. See *Behrens* v. *Hironimus,* (W.Va.), 166 F.(2d) 245. And, in view of the past findings of this Honorable Court, and many other high tribunals, it was the duty of the Court below to grant immediate relief to the petitioner from his illegal confinement.

SECOND ISSUE: Did the Court below err in ruling that the failure to furnish counsel to the petitioner at his request did not and does not invalidate the sentence given him under Virginia Code Section 53-296 (Assignment of error number 2)?

First, the need for the assistance of counsel must be firmly established, to determine whether or not the mandate of the 14th Amendment has been violated.

The Court below held that an accused's rights are not violated when the Court fails to give assistance of counsel to one meeting a fourth offendor charge under the decision of *Gryger* v. *Burke,* 334 U.S. 728, to which reference, petitioner points out, that the *Gryger case* does not apply in this case, and even if it did, has no substantial meaning where counsel is *specifically requested* by the accused.

A close scrutiny of the *Gryger case,* shows us that the case was decided by a split decision, and not only on the [fol. 46] question of counsel, but other issues. In the Gryger case also, was a person who had been arrested eight times for crimes of violence, followed by pleas of guilty or conviction, and in two of such former trials had been represented by counsel. In the petitioner's case we have no such criminal record involved. Not only is there a complete lack of crimes of violence in the petitioner's case as shown by his previous record, but there is the strong fact that he did request counsel at his recidivist hearing. In the Gryger case it plainly sets out that the accused did not attempt to request or exercise his constitutional right. It is further shown by the Court's decision in the Gryger case, that the Court felt that such a man, one who had been arrested and convicted eight times, could not possibly be ignorant of his right to the assistance of counsel, and since this was the case, the Court obviously was under the impression that Gryger knew what he was doing at the time of his hearing when counsel was not requested.

The need for counsel at a Virginia recidivist hearing is one of greatest importance. There are many defenses which may be offered to the Court by a competent and trained legal mind. Perhaps the main defense to be offered as a bar to sentencing, is that one of the defendant's previous convictions was null and void, and that

therefore, the defendant cannot be considered as a third offender. But, how is a defendant, standing alone, expected to raise such a question when it concerns a past conviction?

In *Townsend* v. *Burke*, 334 U.S. 736 (1948), the Supreme Court ruled, in a similar case, that "*the trial court's facetiousness casts a somewhat somber reflection on the fairness of the proceeding* * * *". Thus it would seem, that in denying the defendant his request for the assistance of counsel, that there is something hidden in his criminal records. That this is so, is also evidenced by the fact, that the vast majority of the defendants at a recidivist hearing, that are represented by counsel of their own choosing, are given a lesser sentence than those who are not represented. Petitioner says without hesitation, that fifty percent or better of the sentences given those inmates represented by counsel is suspended in the majority of the cases.

Petitioner says that the need for the assistance of [fol. 47] counsel is also evidenced by the fact that Section 53-296 of the Virginia Code is used with discrimination because it is not fully complied with. The section of law under which recidivist are sentenced declares that information shall be filed against all inmates who have previously been confined "in any penitentiary within the United States." However, this provision is not complied with because only those inmates who have previously been confined in the Virginia penitentiary are proceeded against. This petitioner maintains, that this discrimination between persons, is a willful and deliberate violation of a defendant's right to the equal protection of the laws. See *Lanzetta* v. *New Jersey*, 306 U.S. 451, 455 (1939), where the Court, speaking on Statutes, said:

> "For it is the statute, not the accusation under it, that prescribes the rule to govern conduct and warns against transgression."

See also the cases of *Virginia* v. *Rives*, 100 U.S. 313 (1880); *Yick Wo* v. *Hopkins*, 118 U.S. 356 (1886); *Neal* v. *Delaware*, 103 U.S. 370 (1881); *Barbier* v. *Connally*, 113 U.S. 27 (1884), and *Truax* v. *Corrigan*, 257 U.S. 312 (1921)

where the Supreme Court of the United States has spoken out against the denial of the Equal Protection of the Laws, a denial of the rights of a defendant under purvue of the 14th Amendment to the National Constitution.

In Virginia the question of the assignment of counsel at a recidivist hearing, to petitioner's knowledge, has never been fully stated by this tribunal. A thorough search of available material fails to reveal any decision of this Court where the confinement of a recidivist has ever been collaterally attacked on habeas corpus concerning the denial of counsel at a proceeding under Section 53-296 of the Virginia Code. However, petitioner takes the stand that the proceedings under Section 53-296, since they are criminal in nature (*Wright's* Case, 109 Va. 847), that the situation must be treated the same as any felony conviction; And, since the proceedings are of a criminal nature, and do result in confinement in the penitentiary for a term of more than one year, Section 19-214.1 of the Virginia Code directly applys. This Section of law, as heretofore pointed out, makes it mandatory that counsel be assigned to one standing alone before the Bar of the Court. Fur-
[fol. 48] ther, this Court, in *Fitzgerald* v. *Smyth*, Sup.Ct. of Va., March 9, 1953, 74 S.E. 2d 810, firmly stated that the right to the assistance of counsel upon request, was a fundamental right to a defendant in a criminal proceeding under the provisions of Section Eight of this States Constitution and the 14th Amendment of the National Constitution. Perhaps the boldest and most outstanding statement of this Court in this case was when it said:

> "A refusal of a request for aid of counsel is an invasion of his rights."

THIRD ISSUE: Did the Court err in holding that the rule in *Watkins* v. *Com.*, 174 Va. 518 applied only to those persons accused of crime (Assignment of Error number 4)?

As shown by the Court's opinion, it's interpretation of Section 19-214.1 of the Virginia Code, and of *Watkins* v. *Com.*, 174 Va. 518, is that it applies only to those specifically charged with crime. That may be so; But, is the recidivist hearing not a part of that original charge ac-

cording to the same opinion of the Court below? The Court has stated that it is an ancillary proceeding, and by saying that, it has stated that without the conviction in the first instance, there can be no penalty imposed under Section 53-296. To petitioner, it appears that the Court has made a complete about face from its ruling in the *Newsom* v. *Smyth* case decided on June 3, 1959, wherein the same Court which denied the petitioner relief, declared that an accused is entitled to the assistance of counsel, and that no Court may accept a plea from a defendant not represented by counsel. Is this a fair interpertation of the law?

The Court relied partially upon the case of *Chandler* v. *Fretag*, 348 U.S. 3 in the denial of the petitioner's prayer. Did not the United States Supreme Court in the Chandler case, cite the case of *Powell* v. *State of Alabama*, 287 U.S. 68, which applied the right to assistance of counsel to an habitual criminal as well as one accused of a crime?

Chandler was charged with being an habitual criminal, which this Court and many cited authorities claim is not a crime. Yet, the United States highest Court treated it identically like it would where one was actually accused of crime instead of being an habitual criminal. Therefore this Court, by virtue of the Chandler case, cannot claim that the right to assistance of counsel pertains to only [fol. 49] those actually accused of crime.

Further the doctrine outlined in *Watkins* v. *Com.*, 174 Va. 518, is clearly stated, as to include all persons who are involved in proceedings subjecting the defendant to forfeit his life or liberty. The Virginia Supreme Court, citing the *Barne's Case*, 92 Va. 794, said that the right to assistance of counsel was a fundamental one; And, one of the rights guaranteed under Section Eight of the Constitution of Virginia.

Petitioner respectfully submits, therefore, that this action of the Court below constituted reversible error.

Conclusion

For the foregoing reasons and errors assigned, the petitioner prays that a writ of error be granted from said judgment and that same be reversed and judgment be awarded by this Court in favor of the plaintiff in error.

Petitioner desires to state orally the reasons for granting a writ of error. This petition is adopted as the opening brief.

Petitioner certifies that a copy of this petition was on the 15 day of March, 1960, delivered to the office of the defendant in error, at his office, located at 500 Spring Street, Richmond, Virginia.

Petitioner certifies that this petition is being delivered, by mail, to the Honorable C. Vernon Spratley, Associate Justice of the Supreme Court of Appeals of Virginia, at Richmond, Virginia, on the 15 day of March, 1960.

Respectfully submitted,

/s/ Morgan C. Chewning, Plaintiff in Error

I, Morgan C. Chewning, do hereby certify that in my opinion the judgment complained of in the foregoing petition ought to be reviewed by this court.

/s/ Morgan C. Chewning, Plaintiff in Error

[fol. 50] [File endorsement omitted]

IN THE SUPREME COURT OF APPEALS OF THE COMMONWEALTH OF VIRGINIA IN THE CITY OF RICHMOND

ORDER REFUSING PETITION FOR WRIT OF ERROR—
June 14, 1960

The petition of Morgan C. Chewning for a writ of error to a judgment rendered by the Law and Equity Court of the City of Richmond on the 5th day of February, 1960, in a certain proceeding then therein depending, wherein the said petitioner was plaintiff and W. Frank Smyth, Jr., Superintendent, etc., was defendant, having been maturely considered and a transcript of the record of the judgment aforesaid seen and inspected, the court being of opinion that the said judgment is plainly right, doth reject said petition, and refuse said writ of error, the effect of which is to affirm the judgment of the Law and Equity Court.

[fol. 51] Clerk's Certificate to foregoing transcript omitted in printing

[fol. 52] SUPREME COURT OF THE UNITED STATES

No. 276 Misc., October Term, 1960

MORGAN C. CHEWNING, PETITIONER

vs.

W. FRANK SMYTH, JR., Superintendent of the Virginia State Penitentiary

ORDER OF SUBSTITUTION—March 6, 1961

ON CONSIDERATION of the motion to substitute W. K. Cunningham, Jr. in the place of W. Frank Smyth, Jr. as the party respondent in this case,

IT IS ORDERED by this Court that the said motion be, and the same is hereby, granted.

March 6, 1961

[fol. 53] SUPREME COURT OF THE UNITED STATES

No. 276 Misc., October Term, 1960

MORGAN C. CHEWNING, PETITIONER

vs.

W. K. CUNNINGHAM, JR., Superintendent of the Virginia State Penitentiary

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND GRANTING PETITION FOR WRIT OF CERTIORARI—March 6, 1961

ON PETITION FOR WRIT OF CERTIORARI to the Supreme Court of Appeals of the Commonwealth of Virginia.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 783 and placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

March 6, 1961

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